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Thirty-first session

SUMMARY RECORD OF THE 643rd MEETING

Held at Headquarters, New York,
on Monday, 8 June 1998, at 3 p.m.

Chairman: Mr. MAZILU (Romania)

CONTENTS

ELECTRONIC COMMERCE

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The meeting was called to order at 3 p.m.

ELECTRONIC COMMERCE (A/CN.9/446 and 450)

1. The CHAIRMAN invited Commission members to make general remarks on the report of the Working Group on Electronic Commerce on the work of its thirty-second session (A/CN.9/446).

2. Ms. ALLEN (United Kingdom) said that the United Kingdom Government was convinced of the need for uniform rules on electronic signatures and certification authorities; it was therefore supportive of the work of the Working Group, which it recognized as difficult and complex. It recognized also that there were differences between national positions. The latest working paper on uniform rules (A/CN.9/WG.IV/WP.76) pointed the way forward.

3. Despite the complexity of the subject, the United Kingdom Government believed that uniform rules should be agreed so that national policies could be determined. That latter process was already proceeding in the context of the European Commission, as illustrated by a proposal for a European Parliament and Council directive on a common framework for electronic signatures. Her delegation had therefore hoped that the Working Group would be able to finalize its work in time for the next session of the Commission.

4. Turning to the United States proposal for an international convention on electronic transactions (A/CN.9/WG.IV/WP.77), she said the working paper was a useful input to the debate; however, the opinion of the Working Group in general and the United Kingdom delegation in particular had been that the idea of a convention should not be allowed to divert attention away from the Working Group's task of preparing uniform rules.

5. Mr. BURMAN (United States of America) said that he concurred with the representative of the United Kingdom as to the importance of the work of the Working Group, which was a major factor in the worldwide effort to enhance trade and commerce for all regions by using the new, computer-based technologies to their fullest advantage. He agreed also that there were substantial differences between national positions on which direction international rules should take with regard to the question of, narrowly, electronic signatures, and, more broadly, authentication in computer-based messaging systems, and expressed the hope that those differences could be resolved within the Commission. If, however, success proved elusive, the Commission's programme of work might have to be re-examined.

6. While some delegations believed that progress could be made in a number of areas of international electronic commerce, it remained to be seen if authentication was one of those areas. If progress was not made, it would not be for lack of interest: the Federal Government's interest and concern was the greater because so many individual states were engaged in the subject that the range of legislative approaches in the United States reflected the United Nations in miniature, and because it remained to be seen which approach or approaches would be successful: pending resolution, the disharmony between those approaches was cause for concern.

7. Ms. SABO (Observer for Canada) said that her delegation supported the work the Working Group had accomplished in its area: the Working Group's rapidly developing subject matter had high priority in Canada's jurisdiction.

8. She supported the views expressed by the representative of the United Kingdom: work on authentication was important, and the Working Group should not be distracted or diverted from it by other proposals.

9. She wondered if it was procedurally irregular for the full Commission to discuss a working paper submitted to a Working Group. She wondered also if it was irregular for a working paper to suggest new work for a Working Group when that Working Group was already carrying out its mandated task. In any case, her delegation saw no pressing need to develop a convention that would essentially reproduce the principles and ideas agreed to in the Model Law on Electronic Commerce, as the Model Law was serving its purpose well.

10. She reserved her delegation's right to respond in full to the proposals in document A/CN.9/WG.IV/WP.77 within the Working Group and in the light of other delegations' comments.

11. Mr. TELL (France) urged the Working Group to continue its work on electronic signatures in the manner and along the lines decided by the Commission in 1996, and expressed his delegation's support for the conclusions it had reached in document A/CN.9/446.

12. He said his Government would take an official position on document A/CN.9/WG.IV/WP.77 once it had officially received that document, i.e. when it had received the French version of the document.

13. He recalled that under the heading "Future work", paragraph 212 of the report of the Working Group mentioned a proposal that the Working Group might consider preparing an international convention based on the Model Law and the Uniform Rules. Thus, he believed he could not do otherwise than reserve his delegation's position in respect of a proposal that was not officially before the Commission.

14. In the interim, his delegation's position was to stress that the Working Group's approach to the issue of electronic signatures must be media-neutral; therefore, the evolving nature of authentication technology was no reason for saying that work on the subject was premature or that there was no point in doing it. That said, he believed that for the time being, given the current situation in the field, it was out of the question to attempt to codify the provisions of the 1996 Model Law in an international convention. He supported that point of view by adducing the proposal for a European Parliament and Council directive referred to by the representative of United Kingdom, but stressed that there was no objection in principle to dealing with some matters, but not the matter in question, by means of a convention. The preference in Europe had been to produce the proposal in the form of a directive; it would therefore be up to the legislatures of the member States to transform its provisions into their own domestic law.

15. He stressed that any future instrument on electronic commerce must include consumer protection, but must in no way prevail over existing specific or general consumer protection legislation in States, or substitute for it, or claim to substitute for it. In a European context, the specific legislation was that enacted pursuant to Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in respect of Distance Contracts, which was currently in force. He reminded the Commission that States members of the European Union were ineluctably bound to transform directives into domestic law as quickly as possible.

16. Mr. HERRMANN (Secretary of the Commission), in the light of the comments by the observer for Canada concerning possible irregularities in procedure in respect of working paper A/CN.9/WG.IV/WP.77, suggested that members should indicate whether they were prepared to discuss its contents given that it appeared that not all delegations had been fully informed of them. He expressed the opinion that discussion of the working paper in the Commission should not be barred on the grounds that it had been submitted to a working group. He suggested that the representative of the United States should summarize the working paper so that the Commission could come to an informed decision on whether or where to discuss it.

17. Mr. RENGER (Germany) expressed support for the position taken by the representative of the United Kingdom: the Working Group should not be diverted from its work on electronic commerce.

18. Germany was working on national legislation on electronic commerce; it was involved in the work on the proposal for a European directive on electronic signatures referred to by the representative of the United Kingdom; and naturally it was working on the matter within the Commission and the Working Group. The proposal for a convention would be a diversion of that work at all three levels.

19. Working paper A/CN.9/WG.IV/WP.77 appeared to suggest that the terms of reference of the Working Group should be significantly expanded, begging a procedural question, with an obvious answer, of who should set those terms of reference. If an expansion of the Working Group's terms of reference had been the aim, a formal proposal should have been put to the full Commission. It would be unacceptable to present such an expansion of terms of reference to the Commission as a fait accompli, and the Commission should therefore discuss the proposal now.

20. Mr. BURMAN (United States of America) said that the Commission's Model Law had proved to be a success: however, his delegation's concern was that in that form it might take too long to realize, and so was seeking other means to implement the same provisions.

21. He explained that it had never been his delegation's expectation or intention that representatives should be in a position to discuss working paper A/CN.9/WG.IV/WP.77 at the current session of the Commission, nor did it wish that they should. He agreed with the representative of Germany that indeed it was the Commission that was responsible for setting its working groups' terms of reference, and denied that his delegation had sought to expand those terms of

reference by means of the working paper or to divert the working group away from its work.

22. His country shared a concern with many others about the proliferation of rules, regulations, enabling legislation and laws for the broad range of authentication procedures called "electronic signatures". However, the proposals in the working paper had been premised on another factor: a desire to incorporate as many provisions as possible of the Model Law into a convention format in order to boost them and raise their visibility on the world scene, and to speed adoption worldwide of the principles in the Model Law.

23. He recalled that in 1996 his delegation had taken the contrary position, saying then that it was premature to consider converting the Model Law into a convention. However, times had changed, and rapidly; in that connection, he recalled his earlier remarks about the rather alarming and commerce-damaging disharmony over electronic commerce between the states of the United States. The same process was occurring in and between other countries also: non-uniformity appeared to be the rule rather than the exception. Worse, the rapid rate of change in the field and increasing globalization showed up any inadequacies in the law that much faster, and those inadequacies could annihilate the advantages to be gained from electronic commerce.

24. On the other hand, the increasing reliance on the Model Law by many state legislatures within the United States was to be welcomed: at last there was a single common denominator, and one which enhanced awareness of the Commission and its work.

25. In the working paper, only those provisions of the Model Law that were widely supported had been included as candidates for a convention, although such other provisions as enjoyed consensus in the Commission could be added; there was no question of renegotiating the Model Law in any sense. In support of the latter assertion, he noted that the proposal included a provision to which the United States itself objected.

26. His delegation wished to determine, on an informal basis only and without taking the time of the Working Group, whether other countries from various regions would support the idea of a convention. It was also putting its proposal to other countries directly, with the aim of making possible an informed discussion on the sidelines of the Working Group; nevertheless, his delegation accepted that other countries might not wish to take up the proposal in the context of the Commission, or of its Working Group. His delegation's first choice would be to carry the work forward within the body responsible for drafting the Model Law, and so had presented it first to that body, informally; however, it believed that the issue was so important and urgent that it would pursue the matter in other appropriate forums if necessary.

27. Mr ZANKER (Australia) said that his delegation supported the work of the Working Group on Electronic Commerce, particularly its Model Law on Electronic Commerce, whose articles 5, 6, 7, 8, 10, 11 and 15 had been recommended for incorporation in Australian domestic law by a specially appointed expert panel. Proceeding on the assumption that paper-based and electronic commerce should be treated equally, the Australian expert group had also recommended that

comprehensive framework legislation on electronic commerce should be broad in its operation and apply to data messages and trade and commerce. His Government was actively committed to developing electronic commerce in Australian society and to maintaining consistency between domestic and international law in that field. It supported a media-neutral approach to the drafting of uniform rules on the legal issues of digital signatures and certification authorities. Like the Model Law, the uniform rules should provide guidance rather than impose regulations with a view to facilitating the development of electronic commerce.

28. His delegation had no objection to the United States proposal (A/CN.9/WG.IV/WP.77); a convention, however, would have no impact on the incorporation of the Model Law in Australian domestic law, which as he had indicated, was already under way. Certain aspects of the United States proposal went far beyond the content of the Model Law, for example the proposals concerning non-discrimination and unnecessary barriers to trade, which were being explored by the World Trade Organization in the context of its own study of electronic commerce. Some thought should be given to whether it was necessary for the Commission to address such issues or whether it was preferable to build on its Model Law, which already represented a considerable achievement.

29. Mr. PEREZ (Colombia) said he disagreed with the United States proposal. The Commission's work on the Model Law in the past year had been fruitful; a change in course was not warranted at present. Indeed, in Colombia, a broadly based study of the background documentation for the Model Law had led to the introduction of a draft law on electronic commerce in the Congress.

30. Mr. KÖNKKÖLÄ (Finland) said that the work of the Working Group was highly significant and should continue in the same direction. His Government did not wish to rule out the possibility of adopting a convention on electronic commerce; however, it had been unable to give full consideration to the proposal thus far. For the time being, the matter should be debated within the Working Group. Technology neutrality should be a guiding principle in the drafting of the uniform rules. It might be practical to focus initially on legal questions concerning digital signatures until information about other electronic signature technologies could be gathered.

31. Mr. RENGER (Germany) said he supported the remarks made by the representative of Australia. In the early stages of the development of electronic commerce, States should not be bound by an international convention, which was an extremely inflexible type of legal instrument.

32. Mr. CHOUKRI (Observer for Morocco) said that, while the United States proposal was consistent with the Commission's position on the uniformity of trade law, the question of electronic commerce was too complex to consider drafting a convention just yet. For the time being, the Commission should attempt to address the problems of, inter alia, digital signatures, incorporation by reference, cryptography and technological developments within the context of the uniform rules. An international convention on the subject might be considered at a later date.

33. Mr. MAZZONI (Italy) said that his delegation found the United States proposal interesting but was still awaiting instructions from its Government in that regard.

34. Ms. GUREYEVA (Russian Federation) said that, two years earlier, she herself had suggested that, at some stage, it would be necessary to codify the norms on electronic commerce; at the time, the United States representative had not shared her views. In any case, at a time when countries were at such varying levels of technological sophistication, it was still premature to discuss a convention. In fact, a debate on a convention might impede the Commission in the completion of its basic task of drafting uniform rules.

35. Mr. GILL (India) said that his delegation agreed with the preliminary conclusions contained in section III of the report of the Working Group and supported the programme of work as planned. He advised against drafting a convention while countries were still in the process of incorporating the Model Law in their legal systems. The Model Law afforded countries some flexibility, which was all that was necessary for the time being. The question of a convention could be debated further by the Working Group.

36. Mr. MARADIAGA (Honduras) agreed that the question of a convention should be discussed by the Working Group. The United States proposal was positive and should not be rejected out of hand; however, it was unrealistic at a time when many countries, including his own, had still not managed to incorporate all the provisions of the Model Law in their domestic legal systems. Perhaps the idea of a convention could be introduced as a topic for future debate.

The meeting was suspended at 4.20 and resumed at 4.55 p.m.

37. Mr. ABASCAL ZAMORA (Mexico) asked for clarification of the Commission's current position on the United States proposal. He had been under the impression that there was still a possibility that the Working Group would discuss the proposal at some point, since the Working Group had been entrusted, according to paragraph 250 of the Commission's report on the work of its thirtieth session (A/52/17), with the preparation of uniform rules, without any specification as to the form those rules should take. Mexico felt that the United States proposal should be discussed in the Working Group, which could make a recommendation to the Commission on the type of document it proposed for adoption.

38. Mr. HERRMANN (Secretary of the Commission) agreed that during the previous session the Commission had left open the question of the final form of the final document. He said that the Working Group's mandate did not cover as wide a range of issues as those the United States wished to include in an international convention on electronic transactions.

39. The Commission's position appeared to concur with that of the secretariat. The United States proposal seemed to be based on the premise that a Convention would be more quickly accepted than a Model Law; in his experience, that was not always the case.

40. Furthermore, the mere fact that the Commission took steps to convert the Model Law into a convention would divert attention away from the Model Law, and thereby impede, rather than accelerate, the proliferation of the text.

41. He was concerned that if another organization sponsored a convention on electronic commerce, mirroring the Commission's Model Law, an undesirably competitive atmosphere would prevail between the organizations.

42. Mr. BURMAN (United States of America) noted that there were substantial differences in the track records of model laws. In the rapidly developing field of electronic commerce, it was far from certain that the important provisions of the Commission's Model Law would be retained by many States. It was not only a question of the speed of implementation, but also the degree of harmonization of laws which guaranteed progress. In the absence of a convention, many countries supporting the Model Law might lack sufficient commonality in their legal provisions to establish the legal infrastructure for the promotion of electronic commerce.

43. He also wished to clarify the apparent misunderstanding that it was the United States delegation which had suggested that the subject might be taken up in another international forum. In fact, there had been other States which, in consultation with the United States, had made that proposal. His delegation had expressed the view that the work should remain within the Commission.

44. Electronic commerce had become an increasingly attractive field to several parties outside the Commission, and it was very difficult to restrict it to a small group of active organizations. Driven by a sense of responsibility, his delegation had felt it prudent to raise the issue in the Commission.

45. He assumed that subsequent discussions on the topic would be conducted informally, and his delegation did not intend to allow such discussions to interfere with the regular work of the Working Group. It was to be hoped that any future consideration of a convention format would be carried out in the Commission, and not elsewhere.

46. Mr. ABASCAL ZAMORA (Mexico) said that in principle he opposed the idea that the uniform rules should take the form of a convention; however, he was most concerned that the Working Group had been deprived of the freedom to decide on whether the Model Law would be converted into a Convention.

47. He was also concerned that other States which were not present during the current discussion might not be sufficiently informed of the developments.

48. The CHAIRMAN said that, in general, the representative of Mexico was correct in his perception of the procedures to be followed, and it was up to the Commission to issue instructions to the Working Group.

49. He invited the members of the Commission to comment on the proposals contained in document A/CN.9/450, entitled "Possible addition to the UNCITRAL Model Law on Electronic Commerce: draft provision on incorporation by reference".

50. Mr. GILL (India) said that his delegation had no objection to the insertion into the Model Law on Electronic Commerce of a new article 5 bis on incorporation by reference as adopted by the Working Group, with an explanatory note to be added to the Guide to the enactment of the Model Law.

51. Ms. BRELIER (France) said that her delegation was in favour of the insertion of a new article 5 bis as set out in annex I to the document, in the Model Law. The secretariat's amendment was more precise; however, if a majority emerged in favour of the earlier language, France would have no major objection.

52. Article 5 bis would produce only the effects authorized by domestic law, in particular, those concerning the conditions of opposability to the terms incorporated. Even though the inclusion of article 5 bis could be viewed as neutral in normative terms, it would clearly be useful because it set out the principle of recognition of the legal effects of clauses under incorporation by reference, and that was the prevailing approach to the Model Law.

53. Mr. SORIEUL (International Trade Law Branch) explained that the secretariat had held the view that the decision was to maintain the mandate of the Working Group on uniform rules for digital signatures and other electronic signatures in its current form. He said that experts in the Working Group who were familiar with work on electronic commerce under way in other organizations were not prevented from considering the various alternatives which were open for future work, nor were they prevented from considering the United States proposal.

54. In summarizing the views of previous speakers, he said there appeared to be a common understanding that no mandate existed for the preparation of a convention at the current stage. If the Working Group wished to comment on the United States proposal, or make recommendations based on that proposal, it was free to do so. At its next session, the Commission could then rule on the merit of the proposals submitted by the Working Group.

55. Turning to the issue of the draft provision before the Commission, he said that following extremely detailed discussions the Working Group had adopted article 5 bis. After reconsidering that proposal, the secretariat had determined that the wording was not sufficiently clear on the issue of legal effects and felt that the text would not have the required impact in its current form. The secretariat had suggested a slight modification to further explain the meaning it wished to convey by the term "incorporation of reference", and that alternative wording had been set out in paragraph 7 of the note by the Secretariat in document A/CN.9/450.

56. In addition, the Commission was called upon to rule on a completely new draft section set out in annex II to the document, which had not been considered by the Working Group. The draft section had been prepared by the secretariat, pursuant to a decision made by the Working Group at its thirty-second session. It had been drafted in such a way that it would be applicable regardless of whether the Commission supported the original language of the Working Group in annex I or the alternative proposal submitted by the secretariat in paragraph 7 of the note.

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57. Mr. MARADIAGA (Honduras) said that the document had clearly stated the accomplishments of the Commission, and the explanation provided by the secretariat was also helpful. Referring to paragraph 7 of the note, he suggested that the text should be rephrased in more positive terms.

58. Mr. SORIEUL (International Trade Law Branch) said that all parties would have preferred using positive terms, but it had taken a considerable amount of time to reach an agreement on the nature of the recognition of incorporation by reference.

59. It had been considered more realistic to confine the language to the most cautious terms possible by referring the whole problem to national law, and thereby avoid having to take a position on the juridical value of "incorporation by reference".

60. Mr. LEE (Singapore) said that his Government had recently introduced in Parliament a bill on electronic transfers, which was substantially based on the UNCITRAL Model Law. Electronic commerce relied heavily on incorporation by reference, a technique widely used in traditional paper-based commerce. However, many countries had already established their own rules to govern the use of such techniques in the context of paper-based commerce. The inclusion in the Model Law of detailed provisions on incorporation by reference might therefore create a situation in which countries had separate legal regimes for incorporation by reference in electronic commerce on the one hand and paper-based commerce on the other, which might lead to discrimination against one or the other form of commerce. His delegation therefore supported the inclusion of the proposed new article 5 bis as drafted by the secretariat. It also approved of the text prepared by the secretariat which was contained in annex II.

61. Mr. ABASACAL ZAMORA (Mexico) said that, while his delegation supported the proposed article 5 bis as drafted by the secretariat, in keeping with the Commission's normal practice, the text should first be circulated to member Governments for comments before its formal adoption at the Commission's thirty-second session.

62. Ms. ALLEN (United Kingdom) said that it was time for the Commission to conclude its consideration of the draft provision on incorporation by reference and move on to other topics. Her understanding was that the Commission did not intend to include in the Model Law any reference to the restrictions which certain jurisdictions placed on incorporation by reference. The United Kingdom had earlier proposed a draft text on that subject which, unfortunately, had become too complex and thus likely to upset the balance of the Model Law. However, by adopting a minimalist approach and assuming that legislators would understand what was meant by incorporation by reference, the text adopted by the Working Group had gone too far in the opposite direction. The formulation proposed by the secretariat in paragraph 7, while better in some respects, was somewhat confusing and failed to separate the process of incorporation from its legal effect. She therefore wished to suggest the following formulation for article 5 bis:

> "Where a data message refers to information recorded elsewhere, the data message shall be deemed to incorporate such information as if it were fully

expressed in the data message. Such information shall not be denied legal effect, validity or enforceability solely on the grounds that it is incorporated by reference in a data message."

63. Mr. ZANKER (Australia) said that the word "purported" in the secretariat's formulation of article 5 bis should be replaced by "purporting" or "which purports". He also wished to draw attention to the difference between merely including in a contract a reference to provisions of another instrument and formally incorporating those provisions into the contract. Indeed, the Commission might wish to consider the inclusion in the draft article of a definition of incorporation by reference. His preference would be for the formulation suggested by the Working Group.

64. Mr. RESTREPO-URIBE (Colombia) said he wondered whether the term "fuerza ejecutoria" was the correct Spanish rendering for the English term "enforceability". During its recent debate on the Model Law, the Colombian legislature had decided to use the term "fuerza obligatoria".

65. Mr. PEREZ (Colombia) said that the first paragraph of annex II should contain a definition of the concept of incorporation by reference in order to provide a framework for the discussion that followed. It would also be desirable to replace such general terms as "por lo general" ("usually") and "principalmente" ("heavily") by more specific terms.

66. Mr. SORIEUL (International Trade Law Branch), referring to the statement by the representative of Australia concerning the difference between a mere reference in a contract to the provisions contained in another instrument and the incorporation in the contract of those provisions, said that the secretariat had sought to convey in its formulation the idea that an intention to produce certain legal effects must be present in the act of incorporation by reference. He acknowledged, however, that English was not the first language of the drafters of the text and that that idea might not have been conveyed effectively.

67. On the question of the rendering in Spanish of the term "enforceability", that choice was perhaps best left to national legislators. Delegations from Spanish-speaking countries might also wish to decide among themselves on the best rendering.

68. Mr. KASHIWAGI (Japan) said that the proposed new article 5 bis was substantially acceptable and would neither affect the interpretation of domestic contract law nor override domestic consumer-protection laws. The term "incorporation by reference", however, might be unfamiliar to Japanese legislators and the more descriptive formulation suggested by the secretariat in paragraph 7 was therefore preferable.

The meeting rose at 6.05 p.m.